

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 28, 2009 Session

STATE OF TENNESSEE v. CORY SHANE ROLLINS

Appeal from the Criminal Court for Knox County
Nos. 86243, 88019 Kenneth F. Irvine, Jr., Judge

No. E2008-01407-CCA-R3-CD - Filed February 1, 2010

The Defendant, Cory Shane Rollins, was convicted by a Knox County Criminal Court jury of aggravated robbery, a Class B felony; evading arrest, a Class D felony; and driving under the influence (DUI), a Class A misdemeanor. Following a sentencing hearing, the trial court sentenced the Defendant as a career offender to consecutive sentences of thirty years and twelve years for the aggravated robbery and evading arrest convictions, respectively. A concurrent sentence of eleven months and twenty-nine days was imposed for the DUI. In this appeal as of right, the Defendant argues that: (1) the trial court erred in denying his motion to suppress identification testimony based upon an inherently suggestive pretrial showup; (2) the trial court erred in denying his motion to suppress his statement where the waiver of rights was not voluntarily, knowingly, and intelligently given; (3) the evidence was insufficient to support his conviction for the aggravated robbery; (4) the trial court erred in denying his pretrial motion to exclude references to his drug use contained within his statement; (5) the trial court erred in denying his pretrial motion to exclude testimony regarding destroyed evidence; (6) the trial court erred in overruling his objection to witness testimony that the Defendant was “in the projects” on the night of the offense; (7) the trial court erred in denying his motion to allow him to display the tattoos on his arms to the jury to rebut the victim’s identification testimony; (8) the trial court erred in denying his requested jury instruction regarding an alleged violation of the rule of sequestration; and (9) the trial court erred in sentencing him as a career offender for the aggravated robbery conviction and in imposing consecutive sentences for the aggravated robbery and evading arrest convictions. After reviewing the record, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, Jr., J., joined.

Brian Hunt (on appeal), Clinton, Tennessee; Mark Stephens, District Public Defender; and Christy Murray and Jessica Greene (at trial), Assistant Public Defenders, attorneys for appellant, Cory Shane Rollins.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Senior Counsel; Randall E. Nichols, District Attorney General; and Philip Morton, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

At trial, Whitney Laycock testified that on November 17, 2006, she arrived at the Fusion Tanning Salon (Fusion) around 9:00 in the evening to visit with her friend, Hannah Corum, at work. Miss Corum was working alone that night. According to Miss Laycock, the girls noticed a truck turning into the parking lot, driving around, exiting the parking lot, and then returning to the parking lot. The truck repeated this pattern approximately four or five times. Miss Laycock described the truck as “an older just two door, no backseat, brownish” truck. She stated that she did not notice anything about the driver of the truck, but that the driver’s repeated turning into the parking lot scared them. The girls eventually called Miss Corum’s mother to tell her what was happening. They went to the office and stayed there until they heard the Defendant enter the store.

Miss Corum testified that she came out of the office and approached the Defendant as she would approach any potential customer. Upon approaching him, the Defendant pulled out a knife and said, “Get it now.” Miss Corum pushed a security button, but the Defendant knocked the button out of her hands before the button was activated. The Defendant then “grabbed her arm and pushed [her] behind the counter.” Miss Corum opened the cash drawer while the Defendant held the knife to her back. After grabbing the money, the Defendant left Fusion and drove away. Miss Corum went back into the office and called the police. Within a few minutes, Officer Travis Shuler, a patrol officer with the Knoxville Police Department, arrived at Fusion.

Officer Shuler testified that when he arrived, he had to knock on the office door and “almost” yell to get their attention because the girls were so hysterical. He stated that one of the girls was crying and the other was visibly upset. After taking their statements and learning identifying information about the Defendant, Officer Shuler relayed this information to the other officers to add to the “Be On the Lookout” (BOLO) order that was already transmitted by the dispatch officer. Miss Corum described the Defendant as a white male,

who looked to be in his forties and was somewhere around five feet and five inches tall. He had a beard and his hair was “lighter brown with a reddish tint to it” with some gray. He was wearing sunglasses and a baseball cap with the cap tipped forward and his hair pulled back in a ponytail. The Defendant was also wearing a flannel shirt or jacket that had long sleeves and either khakis or jeans. As Officer Shuler was interviewing the girls, several of their family members arrived at Fusion.

When Officer Shuler was still at Fusion with the girls and their families, he learned that an officer was attempting to stop a vehicle matching the description given by the girls. Officer Shuler instructed some of the other officers that were at Fusion to help intercept the Defendant’s vehicle. Officer Shuler stayed on the scene and kept the girls “updated.” He told them that “we had an officer that was behind a vehicle that was close to the description and the direction that the vehicle was traveling.” He stated that he told them that this was “possibly the suspect that had committed the robbery.”

Officer Benjamin McVay testified that he received the BOLO call when he was traveling Southbound on Interstate 275, South of Interstate 640. After receiving the call, he got off on the Heiskell exit in the Lonsdale/Western Heights area to look for the Defendant. Officer McVay stated that he exited there because he generally finds suspects “inside the projects” and that he wanted to see if he could find the Defendant in that area. According to Officer McVay, he spotted a vehicle matching the description in an area where, according to him, “people commonly go to hide themselves or evidence.” Officer McVay decided to follow the vehicle.

After he witnessed the Defendant make an illegal left-hand turn onto Interstate 275 North, Officer McVay followed the Defendant onto the interstate and initiated his blue lights. The Defendant did not stop. When he turned on his spotlight in order to see inside the vehicle, he noticed that the vehicle was a “reddish-brown” pickup truck and that the driver was a “white male with [a] red or brown haired ponytail and was wearing a red-and-black checkered, flannel shirt.” Officer McVay noted that the Defendant did not stay within the lane lines and appeared to be driving under the influence. Eventually, the Defendant exited the interstate, drove up an embankment, jumped out of the vehicle, and ran into the woods. Other officers arrived and along with Officer McVay, they chased the Defendant into the woods. At some point, a police dog was released. After Officer McVay apprehended the Defendant, the dog “latched onto” the Defendant and bit him several times in the arms, legs, and buttocks area. Once the Defendant was freed from the dog, Officer McVay escorted him back to the police vehicle.

Officer McVay testified that he thought the Defendant was intoxicated because the Defendant was walking unsteadily and he could smell alcohol on the Defendant’s breath.

Officer McVay did admit that the Defendant's unsteadiness could be attributed to the fact that he was just attacked by a dog and bit in the buttocks area. However, later that night, he found a bottle of vodka and an empty beer can in the Defendant's truck.

After the Defendant was arrested, Officer McVay transported the Defendant back to Fusion for identification purposes. Miss Corum positively identified the Defendant as the man who robbed her at knife-point.

Officer Joshua Dykes, a patrol officer with the Knoxville Police Department, also testified at trial. Officer Dykes stated that he inventoried the vehicle after the Defendant was arrested. Officer Dykes found a "knife in the front seat that [had a] silver blade and black handle." The knife had a fixed blade, and the blade was approximately four inches long or less. Officer Dykes confiscated the knife and took it to the Property Department at the Knoxville Police Department.

ANALYSIS

A. Motions to Suppress

The Defendant challenges the denial of his motions to suppress the identification testimony and his statement to authorities, both of which were presented at trial. First, the Defendant contends that his due process rights were violated because the showup was "so inherently suggestive as to give rise to a very substantial likelihood of irreparable misidentification and tainted any further identification, rendering it unusable." Second, relevant to his statement, the Defendant asserts that the waiver of his Miranda rights was not voluntarily, knowingly, and intelligently made. The State argues that the identification testimony was reliable and that the showup was permissible because it "occurred as part of the on-the-scene investigation shortly after the commission of the crime." The State also asserts that his statements were voluntarily, knowingly, and intelligently made.

"[A] trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Id. Both proof presented at the suppression hearing and proof presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress. State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998); State v. Perry, 13 S.W.3d 724, 737 (Tenn. Crim. App. 1999). The prevailing party "is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Odom, 928 S.W.2d at 23.

Furthermore, an appellate court's review of the trial court's application of law to the facts is conducted under a de novo standard of review. State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001) (citations omitted). We will discuss each of the Defendant's issues in turn.

1. Identification Testimony

In upholding the identification procedure in this case, the trial court stated that

[A]lthough [showups] are inherently suggestive and there's any number of problems that are present in showup identifications, the appellate courts of our state have not excluded these as a general rule. And if - - this Court is bound to go by what the appellate courts have said in these areas, so I don't think I can exclude this identification based on the case law that I'm aware of.

And even the way that we'd apply it in this case as far as the amount of time that's involved, it's just over an hour, it would have been considerably shorter but for the chase in the vehicle and on foot and the searching of the woods.

...

As far as your motion to suppress identification testimony, while I agree with you that the courts have been very critical of the whole concept of a showup identification, they have not held that, as a general rule, it's illegal. And I'm not aware of any case that would say that this one is illegal. And so I'm bound by the law in that area and would have to deny your motion to suppress the identification testimony.

Showups and other identification procedures have been "widely condemned" because of their suggestive nature. Stovall v. Denno, 388 U.S. 304, 302 (1967), overruled on other grounds by Griffin v. Kentucky, 479 U.S. 314 (1987). "However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances." Id. Thus, "each case must be considered on its own facts." Simmons v. United States, 390 U.S. 377, 384 (1968). A conviction based on a flawed identification procedure will be reversed only when the procedure utilized in the defendant's case "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id.

In determining whether the identification procedure violated a defendant's due process rights under the Simmons standard, in Neil v. Biggers, 409 U.S. 188, 198-99 (1972), the Court established "a two-part analysis to assess the validity of a pre-trial identification." State v. Richard Perkinson, No. E2008-01180-CCA-MR3-CD, 2009 WL 865339 (Tenn. Crim. App. March 26, 2009). In accordance with the two-part test, if we conclude that the identification procedure was suggestive, we must then determine whether the identification was reliable despite the fact that it was inherently suggestive. Biggers, 409 U.S. at 199.

We must first note that the identification procedure used in this case was unduly suggestive. Before the Defendant was presented to Miss Corum, Officer Shuler gave her periodic updates of the police chase. He told her that this was "possibly the suspect that had committed the robbery." When the Defendant was presented to Miss Corum, he was disheveled, bleeding, and covered in bite marks from a dog. Moreover, he was handcuffed and his clothing was ripped and falling off of his body.

Consequently, to uphold the identification evidence in this case, we must conclude that the identification was reliable. Id. In determining whether the identification was reliable, we must consider the following five factors: "the opportunity of the witness to view the criminal at the time of the crime; the witness' degree of attention; the accuracy of the witness' prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation. Biggers, 409 U.S. at 199-200.

We will discuss each of the five factors in turn. Miss Corum was face-to-face and approximately five feet from the Defendant when he first entered the well-lit store. Although the robbery lasted approximately one minute, she had two more opportunities to view the Defendant. Miss Corum was close enough to the Defendant to see his face as he held the knife to her back, and she saw his face again when he left with the money. Miss Corum gave the police a fairly detailed description of the Defendant with a few minor discrepancies: she was unable to tell the officers whether the Defendant was wearing jeans or khakis; she slightly miscalculated his age; and she thought there may be some gray in his reddish-brown hair. Miss Corum testified that there was "[n]o doubt at all" that the Defendant was the robber when she saw him outside the store. The officers started chasing the Defendant within twenty to thirty minutes of the robbery, and he was presented to the witness approximately an hour after the robbery. While this does not end our inquiry, we conclude that the identification was reliable even though the identification procedure was inherently suggestive.

The trial court was correct in noting that Tennessee courts characterize showups as "inherently suggestive and unfair to the accused." State v. Thomas, 780 S.W.2d 379, 381

(Tenn. Crim. App. 1989). While the federal courts declined to adopt a “strict rule barring evidence of unnecessarily suggestive confrontations,” Tennessee courts have adopted such a rule. Biggers, 409 U.S. at 199. Under Tennessee law, regardless of the totality of the circumstances surrounding the identification procedure, this court will uphold these suggestive procedures only when “(a) there are imperative circumstances which necessitate a showup, or (b) the showup occurs as an on-the-scene investigatory procedure shortly after the commission of the crime.” Thomas, 780 S.W.2d at 381.

An “on-the-scene investigatory confrontation[] within a reasonable time after the commission of the offense [is] permissible . . . [because] ‘the police action in returning the suspect to the vicinity of the crime for immediate identification in circumstances such as these fosters the desirable objectives of fresh, accurate identification, which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is still fresh.’” State v. Moore, 596 S.W.2d 841, 844 (Tenn. Crim. App. 1980) (quoting Bates v. United States, 405 F.2d 1104, 1106 (D.C. Cir. 1968)).

According to Officer McVay, he spotted the Defendant in an area “pretty close to the vicinity of where the robbery occurred” and within twenty to thirty minutes of the robbery. After he was captured, the Defendant was presented to the witness approximately an hour after the robbery. The circumstances in this case involved a young woman who was robbed and a suspect who was armed with a knife. Given these facts, we conclude that the showup was an on-the-scene investigatory procedure because there was “sufficient proximity between the offense and confrontation in both time and place and sufficient imperative circumstances to justify the procedure.” Moore, 596 S.W.2d at 844. Consequently, in accordance with federal and Tennessee constitutional law, the trial court did not abuse its discretion in denying the Defendant’s motion to suppress the showup and resulting identification testimony.

2. Defendant’s Statement

The Defendant claims that he did not voluntarily, knowingly, and intelligently waive his right to silence because he was denied water and medical treatment when he was interrogated. The State argues that the Defendant understood his rights, signed the waiver forms, and answered questions clearly.

In Miranda v. Arizona, 384 U.S. 436, 471-75 (1966), the United States Supreme Court held that a defendant’s statements made during a custodial interrogation are inadmissible at trial unless the State establishes that the defendant was informed of his right to remain silent and his right to counsel and that he knowingly and voluntarily waived those rights. Whether

the Defendant made a voluntary, knowing, and intelligent waiver of his rights depends “upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” Edwards v. Arizona, 451 U.S. 477, 482 (1981) (quoting Johnson v. Zerbst, 304 U.S. 458, 46 (1938)). The waiver must be “made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” State v. Blackstock, 19 S.W.3d 200, 208 (Tenn. 2000) (quoting State v. Stephenson, 878 S.W.2d 530, 544-45 (Tenn.1994)). The State has the burden of proving the waiver by a preponderance of the evidence. State v. Bush, 942 S.W.2d 489, 500 (Tenn.1997).

In denying the Defendant’s motion to suppress his statement, the trial court stated

The Court’s going to credit the testimony of the officer that he did understand his rights, and that it is a valid waiver. That he waived those rights. So I think the statement does come in.

...

It appears that he was aware of his rights enough to decide he wanted to invoke [his right to counsel] at that point. I think that’s important to the decision of whether he waived them before that.

We have a valid waiver. And we have a point at least where it appears that he does ask for the ability to stop, which would be his right. So at this point, up until wherever that comes in the statement, the Court’s going to rule that there’s a valid waiver before that. And then that nothing else beyond that should be brought up without first bringing it up outside the presence of the jury. And that the defense have a chance to be heard on any statements that come after that point.

A review of the circumstances surrounding the interrogation is necessary. The Defendant was treated at St. Mary’s Hospital before he was taken to the police department. Once at the police department, the Defendant was given several bottles of water. The officer then went through the rights waiver form with the Defendant, and the Defendant signed the rights waiver form without any force or coercion from the interrogating officer. The trial court credited the officer’s testimony that the Defendant understood his rights, a finding by which this court is bound. The Defendant was thirty-six years old at the time of the interrogation and had a lengthy criminal history prior to this robbery charge. The Defendant

was aware of his rights throughout the interrogation as evidenced by the fact that he invoked his right to an attorney after just ten minutes of questioning. Accordingly, we conclude that the trial court did not abuse its discretion in denying the Defendant's motion to suppress his statement.

B. Sufficiency of Evidence

The Defendant argues that the evidence produced at trial was insufficient to support his conviction of aggravated robbery. The State argues that the evidence was sufficient to prove each element of aggravated robbery and to prove the identity of the Defendant.

An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). The appellate court does not re-weigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This standard applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

The Defendant was convicted of aggravated robbery, evading arrest, and driving under the influence. The Defendant only challenges the sufficiency of the evidence in regards to the aggravated robbery conviction. Robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401 (2006). Aggravated robbery is robbery "[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon." § 39-13-402(a)(1).

In this case, the evidence presented at trial, viewed in a light most favorable to the State, showed that a truck substantially similar to the Defendant's truck drove by Fusion several times. A few minutes later, a white male, dressed identically to the Defendant and matching his general description, entered the store, showed Miss Corum a knife, and held the

knife to her back as he demanded money from the cash register. Approximately twenty to thirty minutes later, a police officer attempted to stop the Defendant on the interstate. The Defendant refused and led police on a medium-speed chase throughout Knoxville. Eventually, the Defendant jumped out of the vehicle and ran until the police apprehended him with the assistance of a police dog. The officers took the Defendant back to Fusion, where Miss Corum positively identified him.

Here, the elements of aggravated robbery were met. Additionally, “[a] defendant’s flight and attempts to evade arrest are relevant as circumstances from which, when considered with the other facts and circumstances in evidence, a jury can properly draw an inference of guilt.” State v. Zagorski, 701 S.W.2d 808, 813 (Tenn. 1985); see State v. Caldwell, 80 S.W.3d 31, 40 (Tenn. Crim. App. 2002). We therefore conclude that the evidence produced at trial was sufficient for the jury to find the Defendant guilty of aggravated robbery.

C. Prior Bad Acts

The Defendant argues that the trial court erred in refusing to exclude portions of his statements to Detective Florez regarding his drug use. Specifically, he objects to the use of his statement that he “probably” smoked marijuana the day of the robbery and that he tried to buy cocaine on the night of the robbery, but he “didn’t get a chance to.” The Defendant asserts that these sections of his statement constituted evidence of prior bad acts that unfairly prejudiced him and that this evidence should have been excluded pursuant to Rules 404(b) and 403 of the Tennessee Rules of Evidence. The State argues that the trial court properly admitted the evidence as an admission against interest to show motive, intent, and the absence of mistake or accident.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. Tenn. R. Evid. 404(b). Rule 404(b) is generally one of exclusion, but exceptions to the rule may occur when otherwise inadmissible evidence is offered to prove the motive of the defendant, identity, intent, the absence of mistake or accident, opportunity, or common scheme or plan. State v. Tolliver, 117 S.W.3d 216, 230 (Tenn. 2003); State v. McCary, 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003). Rule 404(b) states that a jury-out hearing regarding the admissibility of specific instances of conduct must be held “upon request.” Tenn. R. Evid. 404(b)(1). In order to determine the admissibility of a prior bad act, the trial court should consider the following three factors: (1) whether a material issue exists supporting admission of the prior act; (2) whether proof of the prior act is clear and convincing; and (3) whether the probative value of the evidence is not outweighed by the danger of unfair prejudice. Tenn. R. Evid. 404 (b)(2)-(4). If these three thresholds are met, the evidence may be admitted. We review

a trial court's ruling on evidentiary matters under Rule 404(b) for abuse of discretion, provided the trial court has substantially complied with the procedural prerequisites of the rule. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). If the trial court did not substantially comply with the procedure, its decision is not entitled to deference by the court, and "the determination of admissibility will be made by the reviewing court on the evidence presented at the jury out hearing." Id. at 653.

Although the trial court held a hearing regarding the Defendant's motion, the trial court did not follow the procedural guidelines established in Rule 404(b) in determining whether the testimony of prior bad acts was admissible. The trial court did consider the admissibility of the statements as a Rule 404(b) issue, but the trial court did not consider and make a ruling on all three of the required factors established in Rule 404(b)(2)-(4). Therefore, we must review the evidence presented at the hearing in light of Rule 404(b)'s requirements to determine whether the trial court's denial of the Defendant's motion was proper. We also must examine the evidence in light of Tennessee Rule of Evidence 402, which states that "[e]vidence which is not relevant is not admissible."

The Defendant was charged with aggravated robbery, and evidence regarding the Defendant's drug use and hopes of purchasing crack cocaine on the night of the robbery was relevant to the material issues of motive and intent as to the aggravated robbery charge. Evidence regarding the Defendant's use of drugs and hopes to purchase more drugs was clear and convincing, given the admission of the portion of the statement describing the Defendant's drug use and plans to purchase more drugs for that night. The statements were highly relevant to the Defendant's motive for committing the crime; therefore, the probative value was not "outweighed by the danger of unfair prejudice." Tenn. R. Evid. 404(b)(4). Accordingly, we conclude that no error exists regarding the trial court's admission of the Defendant's statement concerning his drug use and attempts to purchase crack cocaine on the night of the robbery.

D. Destruction of Evidence

The Defendant argues that the trial court erred in denying his motion to exclude testimony regarding destroyed evidence, the knife found in his truck. He contends that the trial court should have excluded all testimony regarding the destroyed knife or issued a jury instruction discussing the State's duty to preserve evidence. The State argues that the trial court acted within its discretion in allowing the testimony regarding the destroyed knife and

that the Defendant has waived the issue regarding the jury instruction because he did not include a copy of the jury instructions in the record on appeal.¹

After hearing a pretrial motion concerning this issue, the trial court reserved ruling on admitting testimony concerning the knife until trial. During trial, the Defendant renewed his objection when Officer Dykes attempted to describe the knife. The trial court stated “I don’t believe Ferguson holds that. Your objection is overruled. He can testify about it. Even if it wasn’t in his presence - - if he never recovered it, and somebody who had seen it, they could testify about what they saw.” At the conclusion of the testimony, the State read the following stipulation into the record:

The parties agree to stipulate to the following facts. That a knife pertaining to this case was received in the Property Division of the Knoxville Police Department from Officer Joshua Dykes on or about November 18th, 2006, and placed in Confiscations. And secondly, that on November 14th, 2007, the knife was accidentally destroyed during the course of routine evidence destruction.

At the conclusion of the trial, the trial court declined to issue a jury instruction regarding the destroyed knife. The trial court stated:

[T]he Court has considered, now that the proof is in, your request for, basically, a Ferguson instruction, and the Court finds that that instruction is not appropriate, that there has been sufficient testimony available that - - both from the officer who was able to describe the knife, the descriptions from the victim in the case, and now you’ve put proof on also from who may well be the owner of the knife, that this instruction would not be appropriate in this case because there was sufficient description of the knife. But you’re able to I think make your point effectively that it’s not the same knife necessarily described as by the victim. So that’s why that instruction is not in there. I’ve considered that and considered all the proof and find that it’s not appropriate to give that instruction.

In determining whether a trial conducted without destroyed evidence is fundamentally fair, we must first determine whether the State had a duty to preserve the evidence in

¹Contrary to the State’s assertion, the jury instructions are included in the record.

question. State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999). If we conclude that the State had a duty to preserve the evidence, then we must consider and balance the following three factors: (1) degree of negligence involved; (2) significance of the destroyed evidence in light of the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence used at trial to support the conviction. Id. The “central objective [in the factor test] is to protect the defendant’s right to a fundamentally fair trial.” Id.

The State must preserve “all evidence subject to discovery and inspection under Tenn. R. Crim. Pro. 16.” Id. This duty is “limited to evidence that might be expected to play a significant role in the defendant’s defense.” California v. Trombetta, 467 U.S. 479, 488 (1984). The evidence must not only be exculpatory, the evidence must also be “of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” Trombetta, 467 U.S. at 489.

The Defendant declares that the destroyed knife possessed exculpatory value and that he was unable to obtain comparable evidence. We disagree. Ms. Gray testified at trial that the knife found in the truck was a fixed-blade kitchen knife with a black handle and a silver blade used for her painting business, and Miss Corum described the knife used in the robbery as a pocketknife. While displaying the knife found in the Defendant’s truck to the jury may have been more effective in demonstrating that the knives were different, trial counsel was able to use the two descriptions from the witnesses to argue that there were two different knives. Consequently, the knife itself was cumulative because it did not possess any more exculpatory value than the witness testimony. Accordingly, we conclude that the trial court acted within its discretion in refusing to issue a jury instruction regarding this issue.

E. Testimony that the Defendant was “in the projects”

The Defendant argues that the trial court erred in overruling the Defendant’s objection to Officer McVay’s testimony that the Defendant was in the “projects” on the night of the offense and that this was an area where people “go hide.” The State does not respond to this issue.

This court has long held that rulings made by the trial court during the course of a trial are afforded a certain amount of discretion because the trial judge has the “opportunity to observe the witness firsthand.” State v. Carroll, 36 S.W.3d 854, 866 (Tenn. Crim. App. 1999). “Absent a clear abuse of this discretion that results in manifest prejudice to the accused, this court will not interfere with the trial court’s exercise of its discretion on matters pertaining to the examination of witnesses.” State v. Schiefelbein, 230 S.W.3d 88, 133

(Tenn. Crim. App. 2007) (citing State v. Johnson, 670 S.W.2d 634, 636 (Tenn. Crim. App. 1984)).

The record clearly indicates what occurred in the trial court as relevant to this issue, and we believe that a recitation of the line of questioning is appropriate here:

Q: And do you know - - what was your purpose of getting off at Heiskell?

A: I work the Lonsdale/Western Heights area as well, and on occasion, on many different robberies and stuff, you find the suspect vehicle inside the projects.

...

Q: What was it about that vehicle that you're noticing from this vantage point that caused you some concern?

A: That vehicle was a smaller, brown pickup truck, older model and it matched the description of the BOLO given.

Q: In what way, besides being a small, brown pickup truck?

A: It was, I believe, coming from an area known for people that go hide and stuff like that after - -

Obj: Your Honor. I think that this is requiring some form of speculation of the officer. It's requiring that he categorize an entire city portion of Knoxville, Tennessee, that we've not heard any testimony regarding as something less than desirable, and it also requires that he speculate as to where this truck came from.

Ct: General, unless you're going to lay some foundation for that part of the testimony.

Q: Well, I think you mentioned earlier that in circulating robbery calls you would go to the Lonsdale area?

A: Yes, sir.

Q: The direction that this truck was coming from, where is Lonsdale in relation to that?

Obj: Your Honor, I'm going to object to the relevance of this, because the direction from which this truck is coming is all the rest of Knoxville. It's anything north of Callahan, is what it sounds like, and I think that it's requiring speculation and I think it's very suggestive.

Ct: I think, Ms. Murray, that would be appropriate for that part that you can go through on cross-examination. But, General, if you're going to lay a foundation, you need to lay it.

At this point, the State moved to a different subject in their line of questioning. The Defendant argues that the trial judge should have sustained counsel's objection to the speculative testimony.

In this case, the trial court instructed the State's attorney to lay an appropriate foundation for the officer's testimony. Upon the second attempt, when the State's attorney failed to lay the appropriate foundation again, the court essentially sustained the Defendant's objection by instructing the State to lay the appropriate foundation. The State then chose to pursue another line of questioning. We conclude that the trial court did not abuse its discretion.

F. Defendant's Request to Show his Tattoos to the Jury

The Defendant argues that the trial court erred in not allowing the Defendant to show the tattoos on his arms to the jury during the course of the Defendant's proof. The Defendant sought to introduce such testimony during the State's proof and again when the Defendant's sole witness, Bridget Gray, testified. The State asserts that the Defendant has waived this issue under Tennessee Rule of Appellate Procedure 27(a)(7) because he failed to cite to the record in his brief where such a request occurred. While the State's assertion is correct, we decline to treat the issue as waived for failing to cite to the record.

The "propriety, scope, manner, and control of cross-examination rests within the sound discretion of the trial court." State v. Schiefelbein, 230 S.W.3d 88, 133 (Tenn. Crim. App. 2007) (citing State v. Hutchison, 898 S.W.2d 161, 172 (Tenn. 1994); State v. Barnard, 899 S.W.2d 617, 624 (Tenn. Crim. App. 1994)). As stated above, "[a]bsent a clear abuse of this discretion that results in manifest prejudice to the accused, this court will not interfere

with the trial court's exercise of its discretion on matters pertaining to the examination of witnesses." Id. (citing State v. Johnson, 670 S.W.2d 634, 636 (Tenn. Crim. App. 1984)).

The record clearly indicates what occurred in the trial court as relevant to this issue. During the State's case, the main witness, Hanna Corum, was asked to stand beside the Defendant for a height comparison. At that point, Defense counsel asked if they would be allowed to present similar demonstrative evidence and show the Defendant's tattoos to the jury to rebut the witness's identification testimony. The trial judge stated that during the State's demonstration, the Defendant could hold his hands out in such a way so that the jury could see the relevant tattoos, but that the Defendant should request to hold his own demonstration during the Defendant's case in chief. During the Defendant's case in chief, the Defendant was allowed to display his hands to Ms. Gray and to the jury. Ms. Gray testified that the tattoos appeared the same as they did on the day that he was arrested for the robbery. Following our review, we conclude that the trial court did not abuse his discretion in directing the manner of this demonstration.

G. Jury Instruction on Witness Sequestration

The Defendant argues that the trial court erred in failing to include a special jury instruction on witness sequestration. The State asserts that the Defendant has waived this issue because he failed to cite to the record in his brief in accordance with Tennessee Rule of Appellate Procedure 27(a)(7). While the State's assertion is correct, we decline to treat the issue as waived for failing to cite to the record. The State also contends that the jury instructions were adequate.

In determining whether the refusal to include a jury instruction was erroneous, we must "review the charge in its entirety and read it as a whole." State v. Hodges, 944 S.W.2d 346, 352 (Tenn. 1997). In reviewing the jury charge, we must keep in mind that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning the way lawyers might." Id. (quoting Boyd v. California, 494 U.S. 370, 380-81 (1990)). If the charge "fails to fairly submit the legal issues or if it misleads the jury as to the applicable law," we must conclude that the charge is "prejudicially erroneous." Id. In contrast, if the jury instructions were "full, fair, and accurately state the law, there is no requirement that special instructions be given." State v. Kelley, 683 S.W.2d 1, 6 (Tenn. Crim. App. 1984) (citing State v. Chestnut, 643 S.W.2d 343, 352 (Tenn. Crim. App. 1982)).

The record clearly shows what occurred in the trial court as relevant to this issue. At the suppression hearing, Officer McVay testified that the Defendant remained in the police car during the showup. At trial, Officer McVay changed his testimony and stated that the Defendant was removed from the car and remained outside of the car for the showup. When

confronted with the change in testimony, Officer McVay stated that he watched Officer Shuler's in-car video the previous day in preparation for the trial. Upon further cross-examination, the Defendant learned that Officer McVay actually watched the video with Officer Shuler. Defense counsel then asked Officer McVay a series of questions intimating that he violated the judge's order of sequestration by watching the video with Officer Shuler. Following the heated exchange, the Defendant requested the following jury instruction in a jury-out hearing:

If you find that after being instructed to not discuss the case a witness did so, then you may consider that fact in assessing the witness' credibility.

The trial court declined to include the instruction stating that counsel could argue the issue to the jury during closing arguments. In addition to allowing the Defendant to impeach the witness on this issue and argue credibility in closing, the trial judge included an instruction relating to the credibility of the witnesses. After reviewing the jury instructions provided in this case, we conclude that the instructions were a full, fair, and accurate statement of the law.

H. Sentencing

The Defendant's final issue is that the trial court improperly sentenced him. The Defendant claims that he should not have been sentenced as a career offender, and he challenges the imposition of consecutive sentencing in his case. The State argues that the trial court properly sentenced the Defendant as a career offender because the Defendant had sufficient prior convictions to qualify as a career offender. The State also contends that the record supports the imposition of consecutive sentencing.

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2005). The appealing party has the burden of showing that the imposed sentence is improper. Id. If review of the record reflects that the trial court properly considered all relevant factors, gave due consideration and proper weight to each factor, and its findings of fact are adequately supported by the record, this court must affirm the sentence. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). Should the record fail to demonstrate the required considerations by the trial court, then appellate review of the sentence is purely de novo. Ashby, 823 S.W.2d at 169. In this respect, for the purpose of meaningful appellate review,

[T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. Tenn. Code Ann. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, (7) the potential for rehabilitation or treatment, and (8) any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

The Defendant committed this offense on November 17, 2006; thus, he was sentenced under the revised sentencing act as enacted by the Tennessee General Assembly in 2005. The act provides that:

(c) The court shall impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:

(1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and

(2) The sentence length within the range should be adjusted, as appropriate, by the presence or

absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c)(1)-(2) (2006).

1. Career Offender Status

A defendant may be sentenced as a career offender if he has received:

- (1) Any combination of six (6) or more Class A, B or C prior felony convictions, and the defendant's conviction offense is a Class A, B or C felony;
- (2) At least three (3) Class A or any combination of four (4) Class A or Class B felony convictions if the defendant's conviction offense is a Class A or B felony; or
- (3) At least six (6) prior felony convictions of any classification if the defendant's conviction offense is a Class D or E felony.

Tenn. Code Ann. § 40-35-108 (2006).

Here, the Defendant has six prior Class C felonies and was convicted of aggravated robbery, a Class B felony. The State submitted that the Defendant qualifies for career offender status pursuant to Tennessee Code Annotated section 40-35-108(a)(1). The Defendant does not deny that he has six prior Class C felonies. Instead, the Defendant argues that the trial court should have treated two of the Class C felonies as a single conviction pursuant to the twenty-four hour merger rule found in Tennessee Code Annotated section 40-35-108(b)(4). Accordingly, the Defendant argues that the trial judge should have sentenced him as a persistent offender because he has five Class C felonies on his record. Id. § 40-35-107(a)(1).

If the Defendant wishes to seek shelter under the twenty-four merger rule, it is his responsibility to "establish that offenses which were committed on consecutive days occurred within twenty-four hours of each other." State v. Freddie T. Inman, Jr., No. W2004-02371-CCA-R3-CD, 2005 WL 729149, at *10 (Tenn. Crim. App. Mar. 30, 2005), app. denied (Tenn. Aug. 29, 2005). The Defendant proved that he committed the offenses on two consecutive days, but he did not establish a time-frame proving that the offenses occurred within twenty-four hours of each other. Additionally, the first offense occurred between the hours of 9 a.m. and 3 p.m., and the second offense occurred sometime the next day and in a

different county. The Defendant has failed to support his claim with sufficient proof. We conclude that the trial court's finding that the Defendant is a career offender is supported by this record.

2. Consecutive Sentencing

The trial court imposed a total effective sentence of forty-two years in this case as follows: thirty years for the Class B aggravated robbery felony conviction and a consecutive twelve years for the Class D evading arrest felony conviction.

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that “[t]he defendant is an offender whose record of criminal activity is extensive” or “is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high.” Tenn. Code Ann. § 40-35-115(b)(2), (4) (2006). When imposing consecutive sentences based on the defendant's status as a dangerous offender, the trial court must, “in addition to the application of general principles of sentencing,” find “that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed.” State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995). In all cases where consecutive sentences are imposed, the trial court is required to “specifically recite [on the record] the reasons” behind imposition of consecutive sentences. See Tenn. R. Crim. P. 32(c)(1); see, e.g., State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing).

In ordering that the Defendant serve his sentences consecutively, the trial court found that “Mr. Rollins has an extensive record of criminal activity, and that alone would qualify him for consecutive sentencing.” The court further ruled that the Defendant “also qualifies under the dangerous offender provision [because] there was a weapon involved” in the robbery and the Defendant was reckless and endangered others when he evaded arrest. Lastly, the judge stated that the Defendant has an extensive criminal history with approximately thirty “prior convictions over a long period of time . . . [a]nd I think . . . under subfactor two or subfactor four, he qualifies for a consecutive sentencing [sic], and that's the appropriate sentence.”

While the trial court's findings regarding the dangerous offender provision may be less than adequate, only one factor is needed for the trial court to act within its discretion to impose consecutive sentences. See Tenn. Code Ann. § 40-35-115, Sentencing Comm'n Cmts. After reviewing the record, we conclude that the trial court's finding that the

Defendant is “an offender whose record of criminal activity is extensive” is supported by the record. Id. § 40-35-115(b)(2).

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

D. KELLY THOMAS, JR., JUDGE